United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Docket No. 75-6043

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P/S

IN THE

United States Court of Appeals

For the Second Circuit

LAURENCE F. KELLY, as Administrator of the Estate of RICHARD C. KELLY,

Plaintiff-Appellant,

—vs.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

—

On Appeal from the United States District Court for the Northern District of New York

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APPELLANT'S BRIEF

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vs.

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Civil Action
No. 73-CV-106

Docket No.
75-6043

APPELLANT'S BRIEF

FACTS

At approximately 11:30 a.m. on the morning of September 4, 1970, the decedent Richard C. Kelly, Dr. Daniel Koretz, Donna Fater, and Ziva Galili embarked on a 19-foot sailboat about two or three miles west of Sodus Point, New York, on Lake Ontario. (RA 1) At approximately 12:00 a.m. the sailboat capsized two or three miles north of the Sodus Point Coast Guard Station. (RA 1-2) At approximately 5:15 p.m. at least three witnesses (Martin Vosburgh, Pat Lupiani, and a Mrs. Byer) observed the capsized boat but felt that the watchman at the Coast Guard Station had a better view than they did and fully expected a rescue effort by the Coast Guard and in reliance thereon, undertook no rescue of their own. (RA 2,15,21) At this time the four persons had been in the water over five hours.

At 6:45 p.m., since no rescue effort was undertaken by the Coast Guard, Mr. Vosburgh or his neighbor called the Coast Guard and told them about the capsized boat. (RA 2,15,21) Several other calls to the Coast Guard brought no satisfactory response. At 7:30 p.m., Mr. Vosburgh or his neighbor called the New York State Police and told them of the capsized boat and requested their assistance. (RA 2,15,21) At 7:35 p.m., after the State Police

called the Coast Guard, the Coast Guard called them to say that they had a boat under way for rescue.

Plaintiffs filed a claim for administrative settlement with the Coast Guard on August 31, 1972. (RA 3) Said claim was denied on October 30, 1972. (RA 3) The complaint was filed in the Northern District of New York on March 13, 1973, under the Federal Tort Claims Act. (RA 38)

QUESTION PRESENTED

The question is whether or not plaintiffs have a remedy under the Federal Tort Claims Act (FTCA) or whether their exclusive remedy lies within the ambit of the Suits in Admiralty Act.

ARGUMENT

Plaintiff has pleaded a proper cause of action under the Federal Tort Claims Act alleging negligence on the part of the Coast Guard by careless representations to persons who would have undertaken or caused to be undertaken rescue operations but for the existence of and representations by the Coast Guard.

a The gravaman of the negligence alleged in Plaintiff's complaint centers on the activity or inactivity of Coast Guard personnel in their actions and conversations with other would-be rescuers such that they delayed attempting to rescue the four persons who were passengers in a sailboat which capsized. It is alleged that this delay caused the death of Richard C. Kelly.

The negligence, the inducement not to undertake the rescue by private citizens, related solely to the representations made by the Coast Guard to private citizens. It would seem that rescue service is a traditional maritime activity of the United States Coast Guard under the National Search and Air Rescue Plan. However, the allegation is that the Coast Guard caused a delay on the part of private

citizen would-be rescuers who would have undertaken the rescue but for the negligence on the part of the Coast Guard. All of these transactions occurred on land. Under FTCA, a tort claim arises at the place where the negligent act or omission occurred and not where the negligence or omission had its "operative effect" (i.e. The situs of injury) Richards v. United States, 369 U.S.1.

POINT I

THE COAST GUARD OWES A DUTY TO PROVIDE PROMPT RESCUE SERVICE OR WARN OTHER WOULD-BE RESCUERS THAT IT COULD NOT OR WOULD NOT UNDERTAKE A RESCUE.

It is of no small significance that the FTCA speaks of claims caused "by the negligent or wrongful act or omission". This is the gravaman of plaintiff's complaint. Plaintiff contends that if the Coast Guard had the men and equipment available, it had an affirmative obligation to undertake rescue efforts. The United States, on the other hand, argues that the Coast Guard is under no obligation to undertake the rescue effort. That is an amazing position in light of the Coast Guard's motto"Semper Paratus"--"Always Ready".

This proposition was too much for the Court in Petition of the United States, 255 F.Supp. 737:

> "The Government closes its eyes to reality when it persists in considering the Coast Guard's rescue operations as the equivalent of the situation in which one private vessel goes to the aid of another. Today and for some years past, the United States Coast Guard has carried out a search and rescue operation on a grand scale, which it is authorized to do by statute, 14 U.S.C.A. Section 88(a)(1), (b), and which it is directed to do by the National Search and Rescue Plan promulgated in March 1956 by the President's Air Coordinating Committee. See United States v. Gavagan, 280 F.2d 319, 322 (5th Cir. 1960). The nature and extent of these activities are widely publicized through the public relations offices of the Coast Guard and other participating

> branches of the miltary service. The availability, and the usual excellence, of the search and rescue service and the fact that many mariners have been saved over the years by heroic action of the Coast Guard, Navy and Air Force are such matters of common knowledge as to be a proper subject for judicial notice. As a result of the holding out of the availability of this search and rescue service and the extensive publicity which it has received over the years, mariners, commercial fishermen, yachtsmen and pleasure boaters, indeed all those who go down to the sea in ships, have been induced to rely on this usually excellent search and rescue service rather than seek assistance from private sources. The instant case is but one example of this reliance. Disabled because rudderless, but in no immediate danger, the BARBARA AND GAIL, which merely needed a tow to land, turned to the Coast Guard for assistance rather than call upon a fellow fisherman. On the other side of the coin, those fishermen and mariners who, true to the tradition of seafarers would otherwise go to the aid of vessels in distress or in need of assistance, now rely on the Coast Guard to do so. For example, in the case of Trawler Frank C., Inc. v. United States, In Admiralty No. 63-65-C, D. Mass. Dec. 22, 1965, decided by this Court, even though four fishing vessels were fishing off a common float they called for Coast Guard help and let the Coast Guard take over both the firefighting on and the towing of the disabled fishing boat." Petition of the United States 255 F.Supp. 737, 748-49.

But, conceding the government's position for the sake of argument, if the Coast Guard is under no obligation to affirmatively undertake to rescue, it is most certainly required not to mislead or otherwise engender reliance on the part of other would-be rescuers that the Coast Guard would act. (For purposes of a motion to dismiss the allegations contained in paragraph four of the complaint: "The Coast Guard Station was then called at 6:45 p.m. Again, nothing was done [to rescue the party] since they relied on the representations of the Coast Guard.")

Clearly the Coast Guard had an obligation to tell these civilian would-be rescuers what it could and was going to do in relation to rescue so that these people could act. This omission constitutes a breach of a duty owed to plaintiff and its breach casts the United States liable.

This principal was laid down in the Indian Towing Co., Inc. v. United States, 350 U.S. 61, 76, that the Coast Guard "must not mislead, and must not induce reliance upon a belief that it is providing." United States v. Sandra & Dennis Fishing Corp. 372 F.2d 189,195. In the alternate, clearly the Coast Guard must give warning that it is not equiped, moved, or for some other reason does not desire to undertake a rescue effort.

The United States Supreme Court in Indian Towing supra held:

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act." 350 U.S. at 69.

The same principle applies with respect to rescue service. At a minimum, the Coast Guard owed the duty to warn would-be rescuers that it could not or would not undertake a rescue effort once it held itself out as "Semper Paratus".

POINT II

PLAINTIFF HAS A CLAIM COGNIZABLE UNDER THE FEDERAL TORT CLAIMS ACT

There is no question that if this action is maintainable under the Suits in Admiralty Act, it is barred under the Federal Tort Claims Act, 28 U.S.C. Section 2680. Further, 46 U.S.C. 745 requires the action be commenced within two years from the date of the tort. This action was commenced six months after the administrative agency has mailed notice of its final disposition of the claim, 28 U.S.C. Section 2401.

Hence, if the suit is co[illegible]zable in Admiralty, it is time barred.

The Government contends that prior to the 1960 Amendments to the Suits in Admiralty Act that some maritime related torts were cognizable under the Federal Tort Claims Act but that since the Amendment to 46 U.S.C. Section 742 which states in part:

> "In cases where if such vessel were privately owned or operated. . .or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in person may be brought against the United States. . ." (Underlined portion part of 1960 Amendment relied on by Government.)

By this amendment the Government argues that all torts which are in any way maritime related must be brought exclusively in admiralty.

Rescue cases have, in the past, been brought under the Federal Tort Claims Act. The Federal Tort Claims Act excludes claims against the United States for which a remedy is provided by the Suits in Admiralty Act. (See 28 U.S.C. 2680). But not all maritime torts have been traditionally covered under the Suits in Admirality Act. There are a number of torts that have some maritime connection maintained under the Federal Tort Claims Act.

> "The Federal Tort Claims act expressly excludes claims against the United States for which a remedy is provided by the Suits in Admiralty Act or by the Public Vessels Act. This does not mean that all maritime or admiralty torts are beyond the coverage of the Federal Tort Claims Act, for the fact is that these two admiralty statutes do not embrace all maritime torts. As one court put it, maritime torts of employees of the United States, as distinguished from the torts of vessels of the United States, were intended to be covered by the Federal Tort Claims Act. (Citing Moran v. United States, 102 F. Supp. 275, 277, where the court rejected the Government's contention that the Tort Claims Act did not apply to maritime torts.) Jayson, Personal Injury, Handling Federal Tort Claims, Section 7.01, p. 1-79." (1974 ed.)

> "The Government's liability under the Act may be based upon either misfeasance or nonfeasance. The language

of the statute is explicit. It permits suits for personal injury or property damage claims caused 'by the negligent or wrongful act or omission' of federal employees. (28 U.S.C. Section 1346 (b)) The distinction between an affirmative act and a failure to act is of little significance today in the field of negligence, for it is the entire course of conduct that is determinative. In Tort Claims Act litigation, of course, liability has been imposed on the Government countless times but the negligence was based on nofeasance as opposed to misfeasance, and vice versa.

"(a)-Rescue Cases; Good Samaritan Cases. Perhaps the most dramatic illustration of application of the rules relating to misfeasance and nonfeasance under the Tort Claims Act is the group of decisions involving the Government's rescue work. It is familiar doctrine that unless there is some relationship between the parties creating a duty to act, nonfeasance will not support a legal cause. Thus, the moral obligation to assist one who is in peril does not give rise to legal liability for failing to assist him. No one, it has been said, is liable for failing to warn the blind man as he walks off a cliff. But it is also familiar law that if one assumes the duty to act, and engenders reliance thereon, there is then a legal obligation to act with care and an obligation not to worsen the situation.

"This Good Samaritan doctrine has been held applicable to the United States. In some instances it may be that the applicable statutes will impose an affirmative duty on the United States to undertake rescue work for analogous activities. But when no such statutory duty is imposed, the courts agree that once discretion is exercised in determining to render assistance, there arises an obligation to act with care and the several facets of the Good Samaritan doctrine come into play. From that point on, of course, the negligence which is actionable may be based on either misfeasance or nonfeasance." Jayson, supra, Section 214.02, 9-42 through 9-46. (Citations omitted.)

In U.S. v. Devane, 306 F.2d 182 (5th Cir. 1962) the Coast Guard negligently handled information which may have caused other would-be rescuers not to undertake a rescue effort because they relied on the Coast Guard's assurance that the party was in no danger when he in fact was in grave peril. (The case was remanded for findings relative to a worsening of position.) All of the negligence occurred in the mis-

handling of information on land although the commercial fishing boat captain of the capsized vessel died at sea. (See also U.S. vs. Gavagan, 280 F.2d319 (5th Cir. 1960, Cert. Den. 364 U.S. 933, 81 S.Ct. 379, 5 L. ed. 365 (1961) (liability imposed for Coast Guard negligence in failing to rescue crew of a vessel in distress); U.S. v. Lawter, 219 F.2d 559 (5th Cir. 1955, liability imposed for Coast Guard negligence in dropping victim to her death at sea during helicopter air-sea rescue. In Indian Towing Co. v. United States, 350 U.S. 61 the government was held liable under the Federal Tort Claims Act for negligence in failing to maintain a light house or warn of its failure.

The Government contends that since the 1960 Amendment which included the words ". . .or if a private person or property were involved. . ." means that these cases can no longer be brought under the FTCA.

They cite T. J. Falgout Boats, Inc., v. United States, 361 F. Supp.838 (C.D. Cal, 1972). off'd 508 F.2d 855 for this proposition. Falgout is bad law. It is not clearly stated either in the text of the amendment or in the legislative history that its purpose was to bring all actions having any connection with navigable water under the Suits in Admiralty Act. The better reasoning as to Congressional intention is found in the decision of Judge Austin in J. W. Peterson Coal and Oil v. United States, 323 F.Supp. 1198 (N.D. Ill. 1970). The court stated:

> "The Government contends that by the inclusion of the words 'or if a private person or property were involved' Congress intended to include all maritime torts within the Suits in Admiralty Act and not just these involving vessels owned, possessed, or operated by or for the Government. Although the cases cited by the Government, Beeler v. United States, 224 F.Supp. 973 (W.D.Pa.1964). reversed on other grounds, 338 F.2d 687 (3rd Cir. 1964); Utzinger v. United States, 246 F.Supp 1022 (S.D.Ohio 1965); Tankredereit Gefion A/S v. United States, 241 F.Supp. 83 (E.D.Mich. 1964)

do support that proposition, this court believes that the 1960 amendment had no such purpose.

The original purpose of the 1920 Suits in Admiralty Act was to free government shipping, both ships and cargo, from the inconvenience of arrest and seizure, and in lieu thereof to provide a remedy by a libel in personam for persons entitled to redress from the United States by reason of the operation of government ships or the transportation of government cargo. Prudential Steamship Corporation v. United States, 220 F.2d 655 (2nd Cir. 1955). The 1960 Amdnement was not intended to change this basic purpose of the statute by enlarging the jurisdiction it conferred but was merely an attempt to alleviate the problems stemming from the fact that suits against the United States involving certain maritime transactions could be brought either in the Court of Claims under the Tucker Act, 28 U.S.C. Sections 1346, 1491, or in the District Court under the Public Vessels Act, or Suits in Admiralty Act. See U.S.Code Cong. and Admin. News, 86th Cong. 2nd Sess., Vol. 2, pp. 3583, 3584 (1960). Because of certain confusing language in the statutes suits were often erroneously filed under one statute in one court and then dismissed because it was too late to refile the suit under the correct statute in the other court. The amendment, therefore, authorized transfer of cases between the District Courts and Court of Claims and vice versa while tolling the statute of limitations, 28 U.S.C. Sections 1406(c), 1506. To eliminate the cause of the problem the confusing language was clarified or eliminated. The requirement in the Suits in Admiralty Act that the Government vessel be operated as a "merchant vessel" which had created the most confusion and had given rise to the possibility that the Government vessel could fall outside the scope of both the Suits in Admiralty Act and the Public Vessels Act was eliminated. See Gilmore and Black, supra at 775. The words 'or if a private person or property were involved' were added not to bring all maritime torts by the Government into the statute's range but more likely merely to: 1) avoid the technical distinction of when goods owned by the Government to be carried on a vessel have ceased to be 'merchandise' and have become 'cargo' which was the point of decision in Ryan Stevedoring Co. v. United States, 175 F.2d 490 (2nd Cir. 1949). U.S. Code Cong. and Admin. News, 86th Cong. 2nd Sess., Vol. 2, p. 3586 (1960); 2) confirm that the Act was not limited to cases where prior to it the Government vessel could have been seized in rem but went farther and gave a remedy in personam against the United States both in cases where only the veseel would be liable and in those cases where the owner of the vessel, if privately owned, would be personally liable. See Pennsylvania Railroad Company v. United States, 245 F.2d 321 (2nd

Cir. 1957); and 3) lay to rest the notion that the Government ownership of cargo must be directly connected with the Government's ownership and operation of a vessel. See Prudential Steamship Corporation v. United States, supra.

That the 1960 amendment was not intended to change the requirement of a vessel 'owned by * * * or in possession of * * * or operated by or for the United States', is supported by the immediate statutory context of the phrase in question. Van Dusen v. Barrack, 376 U.S. 612, 84 S.Ct. 805, 11 Ed.2d 945 (1964). The full title of the chapter embracing 46 U.S.C. section 742 in Suits in Admiralty By or Against Vessels or Cargoes of United States. The amended 46 U.S.C. Section 742, itself, still speaks of suits being brought in the district 'in which the vessel or cargo charged with liability is found'. And 46 U.S.C. Section 740 speaks of presenting a claim to the 'agency owning or operating the vessel' involved. Ira S. Bushey & Sons, Inc. v. United States, 276 F.Supp.518 (E.D.N.Y.1967), reversed on other grounds, 398 F.2d 167 (2nd Cir. 1968); 1 Jayson, Handling Federal Tort Claims, Section 7.01 (1964); 2 Jayson, supra at Section 257; and Petition of United States, 216 F.Supp. 775 (D.OR.1963) also support the view that a Government vessel is still required. Based on the foregoing, the court concludes that unless the vessel was 'owned by * * * in the possession of * * * or operated by or for the United States' there is no remedy available under the Suits in Admiralty Act." 323 F.Supp. at 1204-05.

Peterson, a 1970 case cited Jayson's Work Personal Injury - Handling Federal Tort Claims - published in 1964. The 1974 edition carries forward the same analysis some 14 years after the Amendment to the SIA which the government claims removed all maritime related torts from the jurisdiction of the FTCA. In the 1974 edition Jayson states:

"Thus, the United States may be held liable under the Tort Claims Act for. . .negligence in connection with rescue operations at sea. . ." 2 Jayson, supra at Section 257, 13-13,14.

The court in T.J. Falgout twisted the intent of 46 U.S.C. Section 742 as amended in 1960 beyond recognition. First, Title 46 is entitled "SHIPPING". In no sense can it be said that the instant case even remotely deals with shipping. Chapter 20 is entitled - "Suits in

Admiralty By or Against Vessels or Cargoes of United States." How can it be said that the facts of the instant case is a suit "by or against" a "vessel or cargo" of the United States? What plaintiff is claiming is that the Coast Guard mislead would-be rescuers into failing to undertakee rescue effort thereby worsening his position. No United States vessel is involved and finally, the language of the 1960 amendment brings no clue of the broad sweep that the government would have this court give to harmonize the statute of limitation between the Public Vessels Act, the Suits in Admiralty Act and the Tucker Act; and secondly, to resolve the confusion as to whether a vessel is a "merchant vessel" or a "public vessel" and to avoid "fruitless jurisdictional controversy" and to bring "all maritime claims against United States vessels into the admiralty jurisdiction of the district courts." Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 at 169. (emphasis supplied) No where can there be found any intent to alter the practice of bringing maritime related torts, such as air-sea rescues, under the Federal Tort Claims Act. Chief Judge Brown in De Bardeleben Marine Corp . v. United States, 451 F.2d 140 (5th Cir.1971) reviewed the confusion which led up to the enactment of the 1960 amendment to the SIA. It is clear that Congress intended to deal with the problems created by overlap with the Suits in Admiralty Act, the Public Vessels Act and the Tucker Act with their different periods of limitation and the inability to transfer cases that were filed in the wrong court. No where in the legislative history is it suggested that maritime related actions such as rescue cases were to be included in the amended SIA. It may be that, as Judge Brown suggests, that "non-ship-non-cargo" claims under the FTCA would produce irrational distinctions but it is respectfully submitted that Congress would have spelled out more clearly and precisely in both the statutes and the legislative history if that was the intent. The effort

by Congress to state its intent some 12 years after the enactment of the 1960 amendment should not be a factor in this matter. (See Richmond Marine Panama, SA v. United States, 350 F.Supp. 1210, at 1220n.) This court can render a service by requiring some modicum of clarity in statutory construction. If this court rejects the verently discovered intent (some two years after Mr. Kelly died) it will encourage Congressional action to clarify this matter.

In the instant case, we are talking about a small pleasure boat operating on Lake Ontario which was not owned by the Government. No government vessel was involved. At all times in which the government was involved, e.g. when they got the first call, or when the reasonable exercise of care the watchstander should have seen the capsized boat, all four of the persons were already in the water. Hence, at all material times that the Coast Guard was or should have been involved, there was no sailing or navigation on the water. All of the negligence discussed in Point I took place on land. The communication from the private individual was from land on Sodus Point, New York to the Coast Guard also on land. The would-be rescuers would have received word and left from land. (In fact, they did depart the shore after a delay caused by the Coast Guard.)

The true purpose of the origin of admiralty jurisdiction should be kept in mind in relation to the facts in this case.

> "The admiralty jurisdiction in England and in this country was born of a felt need to protect the domestic shipping industry in its competition with foreign shipping, and to provide a uniform body of law for the governance of domestic and foreign shipping, engaged in the movement of commercial vessels from state to state and to and from foreign states. The operation of small pleasure craft on inland waters which happen to be navigable has no more apparent relation to that kind of concern than the operation

of the same kind of craft on artificial inland lakes which are not navigable waters." Crossen v. Vance, 484 F.2d840 (4th Cir. 1973)

The exercise of Admiralty jurisdiction in pleasure boat cases, especially in light of the monumental case loads of the Federal Courts, "seems to us rather senseless when any reason for federal concern for this kind of litigation is so vague and uncertain." Crossen v. Vance, supra at p. 841. (See Stolz, Pleasure Boating and Admiralty: Erie at Sea, 51 Cal.L.Rev. 661 for arguments against the existence of admiralty jurisdiction in pleasure boat accident cases.)

In the instant case, since the United States is a party, the action must be commenced in Federal Court, but in pleasure boat accident cases there appears no reason why these could not be relegated to the State Courts. Admiralty jurisdiction is a body of specialized law dealing with the domestic shipping industry. To require that all pleasure boat accident cases would unnecessarily add to the burden of the already overburdened Federal Court dockets.

It is respectfully submitted that the 1960 amendment does not place all maritime related torts under the Suits in Admiralty Act and that this court in Ira S. Bushey & Sons, Inc., v. United States supra recognized that a vessel belonging to the United States is required to invoke the SIA. Traditionally, rescue cases have been recognized as cognizable under the FTCA and the 1960 amendment does nothing to alter that situation.

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RE: LAURENCE F. KELLY, etc. v. UNITED STATES OF AMERICA

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

EVERETT J. REA , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

That at the request of OOT, GREENE, SETRIGHT, HERSHDORFER, & SHARPE, Attorneys for Plaintiff-Appellant, he personally served ~~three~~ two (2) copies of the printed ~~[Record]~~ [Brief] and one (1) [Appendix] of the above-entitled case addressed to:

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Everett J. Rea

Everett J. Rea

Sworn to before me this 8th
day of Aug. , 1975.

Ruth L. Moloughney
Commissioner of Deeds

cc: Oot, Greene, Setright, Hershdorfer & Sharpe

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